Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1994

RALPH HARBOLD,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

F. Lee Bailey*
Daniel Patrick Leonard
Bailey, Fishman & Leonard
66 Long Wharf
Boston, MA 02110
(617) 723-1980

*Counsel of Record

ISSUES PRESENTED

I. Whether the Appellate Court of Illinois erred in affirming the trial court's denial of Motion to Dismiss Indictment in violation of the Petitioner's due process rights where the Petitioner was convicted twice for the same crime and each conviction was overturned due to prosecutorial misconduct of the same kind occurring at each trial.

II. Whether the Appellate Court of Illinois erred in affirming the trial court's denial of Motion for Costs and Attorneys Fees where the deliberate prosecutorial misconduct of the State's attorney resulted in two convictions and two Appellate Court reversals based upon the same charges in violation of Petitioner's right to a fair trial.

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No. _____

In the
Supreme Court of the United States
October Term, 1994

Ralph Harbold,
Petitioner,

v.

People of the State of Illinois,
Respondent.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

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OPINION BELOW

The Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal in an unpublished notice on October 6, 1994 which is attached hereto as Appendix E. The Order of the

Appellate Court of Illinois, No. 1-93-0518 (1st Dist. 5th Div. May 20, 1994), affirming the Circuit Court's judgment, is unpublished and is attached hereto as Appendix A. The Order of the Circuit Court denying Petitioner's Motion To Dismiss Indictment is also unpublished and is attached hereto as Appendix B. The Report of Proceedings of Motion Hearing setting forth the findings of fact and conclusions of law relating to the Motion To Dismiss Indictment and Motion For Costs and Attorneys Fees is attached as Appendix C.

JURISDICTION

On May 20, 1994, the Appellate Court of Illinois affirmed the Circuit Court's denial of Petitioner's Motion to Dismiss Indictment and Motion for Costs and Attorneys Fees. (A1) On October 6, 1994, the Supreme Court of Illinois denied a Petition for Leave to Appeal. (E1) Jurisdiction is conferred upon this Court by 28 U.S.C. § 1257(a) to review final judgments rendered by the highest court of a State. The petition is filed within ninety days of the denial of Petition for Leave to

Appeal pursuant to Supreme Court Rule 13.4.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . . "

FOURTEENTH AMENDMENT

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The Petitioner was charged with the murder of Frank Paul by indictment returned on April 4, 1981. At his original trial, the Petitioner was convicted of murder and was sentenced to 75 years of imprisonment. The conviction was reversed and the case was remanded for a new trial on the ground that, inter alia, the prosecutor unfairly undercut the defendant's presumption of innocence in closing argument. The Appellate Court

determined that the State's argument "confused and distracted the jury" and "excited the suspicion of guilt" because the prosecution's assertion was based solely on the evidence that the Mr. Paul's wife and Petitioner spent time together more than three years before the crime. The unsupported motive evidence presented by the prosecution was that Petitioner killed Mr. Paul to prevent his alleged paramour from moving away with the victim.

Prior to Petitioner's second trial, a pre-trial hearing concerning

application of the Appellate Court's decision was held. At that hearing, the Assistant State's Attorney, Michael Mermel, who had assisted in the first trial and was assigned as lead prosecutor in the second trial, was instructed by Judge Hoffenberg not to mention the inflammatory and improper motive theory. Judge Hoffenberg stated:

> If you go into motive testimony at any time in your case in chief other than what I've ruled on, I'm going to hold you in contempt, I'm warning you now so we don't have any misunderstanding.

During the closing argument of the second trial, however, Mr. Mermel

disregarded Judge Hoffenberg's emphatic order as evidenced by the following exchange:

> MR. MERMEL: The defense counsel has asked you to think about why he might have done it. Well, maybe he admired Mrs. Paul from afar.
>
> MR. ECHELES: I object, your Honor.
>
> THE COURT: Sustained.
>
> MR. ECHELES: Wild speculation having no relationship to any piece of evidence, Judge.
>
> THE COURT: Mr. Echeles, sustained.
>
> MR. MERMEL: The evidence shows that while Mr. Paul did not share Mrs. Paul's interest in aviation, this man did. This man had involvements with Mrs. Paul financially as well as through business: He purchased airplanes from Mrs. Paul, leased them back to Mrs. Paul. The shared the hobby of collecting classic T-

> bird cars. They both had their cars done by Mr. Wisniewski.
>
> After the trial, go back to your parlors and your dens and you can talk about it at the local tavern and you can satisfy yourself and maybe think about why you think he did it; but the Judge is not going to instruct you that we have to prove one iota of evidence as to why. So let's keep on the track and not be distracted by the red herring.

Shortly after this argument, the jury returned a verdict convicting Petitioner for a second time.

Petitioner appealed and the Appellate Court reversed based on the prosecutor's improper motive argument:

> The prosecutor's comment that "maybe he admired Mrs. Paul from afar" was not based on evidence presented at

> trial. It was pure speculation, as defendant noted in his objection, and supplied the jury with a motive in an otherwise closely-balanced circumstantial case. When defendant's objection was sustained, the prosecutor continued his argument focusing on the shared interests of defendant and Horton. The implication of the comments was obvious. Without the suggestion, the evidence would not have led the jury to that conclusion. Further, the comments were a back door attempt to present the jury with a motive when evidence of motive was specifically excluded from trial. **We can only conclude that the prosecutor deliberately circumvented the court's ruling excluding motive evidence.**

(D29-30)

No petition for rehearing was filed and the Illinois Supreme Court denied the People's Petition For Leave To Appeal.

The case was remanded to the Circuit court for a second retrial.

Upon remand, Petitioner filed a motion in the trial court to dismiss the indictment contending, that his continued prosecution violated his right to due process and his right to be free from multiple prosecutions as protected by the Fifth and Fourteenth Amendments to the United States Constitution." Specifically, the Petitioner asserted in this Motion that "[t]he continued prosecution of the Defendant would also violate his right to Due Process and a Fair Trial as

guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution." Petitioner also filed a motion, based upon the same grounds, alternatively seeking that the State pay the costs of defending the third trial, including the cost of attorneys fees. An evidentiary hearing was on these motions on October 1, 1992 where Mr. Mermel was called as a defense witness. Mr. Mermel testified that he believed it was acceptable and within the court's pretrial ruling to present motive evidence if defense counsel "opened the door to motive."

He claimed that he neither intended to provoke a mistrial nor intended to convey to the jury that Petitioner and Mrs. Paul were having an affair. The trial Court denied Petitioner's Motion to Dismiss Indictment on October 1, 1992 and subsequently his Motion for Costs and Attorneys Fees on October 29, 1992. (B2) The trial court did not issue any written findings of fact or conclusions of law, but stated on the record at the hearing that he found no evidence that Mr. Mermel intended to provoke a mistrial when he made the improper argument and thus there was no

double jeopardy bar to a second retrial or violation of Due Process. (C4-5)

An appeal was filed based on State and Federal constitutional violations of the Double Jeopardy and Due Process Clauses. Specifically, the Petitioner argued in his brief to the Appellate Court that the trial court "erred in failing to dismiss the indictment because the continued prosecution of Dr. Harbold is fundamentally unfair and constitutes a violation of his Due Process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution." On May

20, 1994, the Appellate Court of Illinois affirmed the trial court's denials of Petitioner's motions, ruling, inter alia, that Petitioner's right to Due Process and a Fair Trial had not been violated. (A17) The Appellate Court on October 6, 1994, the Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal. (E1)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW REFUSING TO DISMISS THE INDICTMENT AFTER TWO APPELLATE COURT REVERSALS BASED UPON THE SAME PROSECUTORIAL MISCONDUCT PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW AND SHOULD BE DECIDED BY THIS COURT.

A. The Appellate Court of Illinois' Decision Refusing To Dismiss The Indictment Against Petitioner Despite Improper Remarks Regarding Motive Made By The Prosecutor At Two Trials And The Resulting Reversals Based Upon The Same Prosecutorial Misconduct Violates Petitioner's Fourteenth Amendment's Due Process Right To A Fair Trial.

The Appellate Court of Illinois rejected Petitioner's claim that the continued prosecution of Petitioner is fundamentally unfair and constitutes a

violation of his Due Process rights as guaranteed by the Fifth and Fourteenth Amendment for the United States Constitution. A prosecutor, however, has a duty to conduct a prosecution in accordance with the notions of fundamental fairness which underlie the Due Process Clause of the United States Constitution and which form the basis for the rules and statutes which govern the trial of criminal matters in the State of Illinois. Berger v. United States, 235 U.S. 78, 55 S.Ct. 629, 633 (1934). Similarly, a trial court has the inherent duty and corresponding

authority to dismiss an indictment where there has been a denial of due process through the misconduct of government officials. United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637 (1973)(where conduct of the government is fundamentally unfair and "shocking to the universal sense of justice, mandated by the Due Process Clause" the indictment must be dismissed. Id. at 432.)

Petitioner stood before the lower court eleven years after the killing of Frank Paul and after serving several years in prison, having been convicted

twice by jurors tainted by the deliberate misconduct of the prosecution. A system which would permit Petitioner to be tried for a third time cannot be called fair. If Due Process is to be afforded true meaning it must be deemed to mandate the termination of the charges against this defendant. Petitioner has been harmed by the misconduct of the prosecution in the most profound way. He will be severely prejudiced in the defense of this matter by the extreme passage of time. Petitioner has been effectively beggared by the severe

financial strain imposed on him by his decade-long attempt to defend himself. He has withstood all that justice should require anyone accused of a crime to endure.

Equally important, to allow the People of Illinois to try Petitioner for a third time would serve to reward an unprecedented pattern of prosecutorial misconduct.[1] On the other hand, the dismissal of the indictment would send a clear message

---

[1]Counsel's research has not revealed a single authority in any jurisdiction in which a case was reversed twice based on the same prosecutorial misconduct.

that this type of improper conduct will not be tolerated.

These arguments were presented to the trial court which made the following comments regarding them:

> This would be an easier case for me to decide if we were arguing about a second rather than a third trial. Mr. Bailey has made that clear.
>
> I'm troubled, as is the defense, that circumstances have conspired to make of this case a saga extending over now decades rather than a case that ideally, like most criminal cases, should be disposed of in months; but other than this emotionally equitable argument advanced by the defense, I simple can't find any way, under the law I'm bound to follow, to do anything other than to let the third trial proceed.

(C3)

Obviously, the trial court was impressed with the Petitioner's position but felt constrained as a matter of law and was unable to remedy the wrong perpetrated upon Petitioner.

Likewise, the Appellate Court rejected Petitioner's argument, noting that Petitioner had "not cited any analogous case in this state where a trial court's denial of defendant's motion to dismiss an indictment was reversed by a reviewing Court because retrial violated due process rights." (A17)

While the lower courts were correct in asserting that there was no direct precedent supporting the Petitioner's argument that his due process rights had been violated by the State's misconduct in his successive trials, they erred in denying Petitioner the relief be sought based on this gap in the law. Indeed, this lack of precedent is not surprising given the highly (and thankfully so) unusual circumstances of this case. It is hard to imagine a more outrageous and arrogant display of prosecutorial overreaching than that which occurred

in this case. The lower courts' narrow and inflexible analysis of the issue disregards the broader principle of fundamental fairness which underlies the due process guarantee and the basic notion that constitutional interpretation is not a static process.

It is respectfully submitted that the principles set forth by this Honorable Court in Berger, supra and Russell, supra provide a framework and compelling basis for the relief sought by the Petitioner.

Accordingly, the Petitioner respectfully asks this Honorable Court

to vindicate his rights by granting the within Petition and ordering the dismissal of this prosecution.

B. The Appellate Court of Illinois' Decision Refusing To Grant Costs And Attorneys Fees To Petitioner Despite The Deliberate Misconduct Of The Prosecution And The Resulting Retrials Forces Petitioner To Bear The Costs Of A Third Retrial and Violates The Fifth and Fourteenth Amendments' Guaranty of Due Process and Fundamental Fairness.

Petitioner, as an alternative to his motion to dismiss the indictment, submitted a motion requesting the trial court to order that the costs of defending the third trial of this matter, including attorney fees, be

paid by the State of Illinois. This Motion was denied. The Appellate Court affirmed the trial court's denial of this motion.

The notion that an individual charged with a crime should not be subjected to multiple prosecutions by the sovereign is "one of the oldest ideas found in western civilization". People v. Pendleton, 75 Ill. App.3d 580, 394 N.E.2d 496, 504 (1st Dist., 4th Div. 1979), quoting, Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting). One of the primary interests served by the

proscription against multiple prosecutions, which has been codified in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, is the avoidance of the gross injustice which result from requiring the accused to mount more than one defense. As this Honorable Court has noted, a second prosecution "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing", Arizona v. Washington, 434 U.S. 497, 503-504, 98 S.Ct. 824, 829 (1978), and

increases "the possibility that even though innocent he may be found guilty". Green v. United States, 355 U.S. 184, 188, 78 S.Ct. 221, 223 (1957).

In the instant case, Petitioner, is facing not a second, but a **third** trial, and the burden, both emotional and financial, has increased accordingly. He has spent a total of 5½ years in prison as a result of convictions which were tainted by the misconduct of the State's agents. As a consequence of these periods of incarceration and his ten-year effort to defend himself,

Petitioner has suffered a complete depletion of his life's savings and, more critically, has been stripped of his ability to earn a living. His license to practice chiropractic medicine has been revoked. He has spent in excess of $400,000 in attorneys fees and other defense costs during this decade-long prosecution.

The Appellate Court of Illinois, in reversing Petitioner's second conviction, concluded that the prosecutor "deliberately circumvented" the trial court's earlier order when he referred in his final closing argument

to the speculative and inflammatory theory that the defendant had an "illicit relationship" with the wife of the victim. (D30). This same prosecutor had assisted in the first trial and was acutely aware, because of the Appellate Court's reversal of the first conviction and the trial court's order under threat of contempt, that his comments were highly improper and would likely result in a third trial. Under these circumstances the prosecutor can only be deemed to have been motivated by a bad faith desire to harass the defendant, depriving him of his due

process rights. The State should not be rewarded for the egregious conduct of its agent by being placed in an advantageous position in a third trial due to the Dr. Harbold's inability to pay for the best defense available.

While counsel is not aware of any rule, statute or precedent which explicitly provides for the relief sought, there is an analogous remedy which has long been a feature of civil practice in Illinois and elsewhere. Specifically, civil litigants who have been the victim of bad faith practice have traditionally been able to

petition the court to order the offending party to pay the costs of litigation, including in some cases, attorney fees. For example, Rule 137 of the Rules of the Illinois Supreme Court, provides that a party found to have filed a pleading or motion which is not well grounded in fact and law or which is interposed to harass or for some other improper purpose may be subject to sanctions, including paying the costs and attorney's fee of the opposing party. To afford such a remedy in the civil realm but to deny it in the context of criminal

litigation would do great violence to the fundamental notion that individual liberty is paramount.

Accordingly, Petitioner respectfully requests that this Honorable Court grant the within Petition and enter an order requiring the State of Illinois to pay the costs of Petitioner's defense in the event a second retrial is permitted.

CONCLUSION

Based on the foregoing arguments and authorities, this Honorable Court is respectfully urged to grant the Petition for Writ of Certiorari.

Respectfully submitted,

*F. Lee Bailey
Daniel Patrick Leonard
Bailey, Fishman & Leonard
66 Long Wharf
Boston, Massachusetts 02110
(617) 723-1980

*Counsel of Record

APPENDIX A

APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIFTH DIVISION
May 20, 1994

No. 1-93-0518

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)Appeal from the)Circuit Court)of Cook County.
v.	)Honorable)Robert Cahill,
RALPH HARBOLD, Defendant-Appellant.	)Judge)Presiding.

JUSTICE McNULTY delivered the opinion of the court:

Ralph Harbold was indicted for murder on April 4, 1981. After a jury trial defendant was convicted and sentenced to 75 years' imprisonment.

The appellate court reversed the conviction and remanded the case for a new trial. Defendant was retried by jury, and was found guilty again. This time he was sentenced to 70 years' imprisonment. On appeal the appellate court reversed the conviction a second time, and remanded the cause for a third trial. Prior to the third trial, defendant moved to dismiss the indictment against him arguing that a third trial would violate his right to be free from multiple prosecutions and his right to due process as secured by the double jeopardy and due process

clauses of the fifth and fourteenth amendments to the United States Constitution (U.S. Cont. amends. V and XIV), article 1, sections 2, 8, 10 and 13 of the Illinois Constitution (Ill. Const. 1970, art I, §§ 2, 8, 10, and 13), and section 3-4(a) of the Illinois Criminal Code (720 ILCS 5/3-4(a) (West 1992)}. In that motion defendant asserted that both of his trials were tainted by prosecutorial misconduct and in the second trial the prosecutor used a highly improper final argument intended to avoid an acquittal. In both trials the misconduct included

arguing without basis in the evidence, that defendant killed the victim because of a romantic interest in his wife. The first time the appellate court reversed defendant's conviction it concluded based on that improper argument that the conviction was obtained through the use of incompetent evidence and "accompanying inflammatory argument." (People v. Harbold (1984), 124 Ill. App. 3d 363, 377, 464 N.E.2d 734, 745.) Prior to defendant's second trial the issue of this "motive" theory arose again in a pretrial hearing. At that time the assistance State's

attorney who conducted defendant's second trial the issue of this "motive" theory arose again in a pretrial hearing. At that time the assistant State's attorney who conducted defendant's second trial and who had assisted in the first, was specifically instructed not to go into the motive theory on pain of contempt. Nonetheless, during his final closing argument in defendant's second trial, the assistant State's attorney argued as follows:

"[Assistant State's Attorney]:

The defense counsel has asked you

to think about why he might have done it. Well, maybe he admired Mrs. Paul from afar.

[Defense counsel]: I object, your honor.

THE COURT: Sustained.

[Defense counsel]: Wild speculation having no relationship to any piece of evidence, Judge.

THE COURT: Mr. Echeles, sustained.

[Assistant State's Attorney]: The evidence shows while Mr. Paul did not share Mrs. Paul's interest in aviation, this man did. This man

had involvement with Mrs. Paul financially as well as through business: He purchased from Mrs. Paul, leased them back to Mrs. Paul. They shared the hobby of collecting classic T-bird cars. They both had their cars done by Mr. Wisniewski.

After the trial, go back to your parlors and your dens and you can talk about it at the local tavern and you can satisfy yourself and maybe think about why you think he did it; but the Judge is not going to instruct you that

we have to prove one iota of evidence as to why. So let's keep on the track and not be distracted by the red herring."

In addition to the motion to dismiss defendant filed another motion, based on the same grounds, alternatively seeking that the State pay the costs of his defense, including attorney fees. The trial court denied both motions after an evidentiary hearing held on September 3, 1992. At that hearing the assistant who tried defendant's second trial testified that he felt "very good" about the possibility of a

conviction, that he did not want a mistrial, and that he did not intend a mistrial. The trial court stated on the record at the hearing that it found no evidence that the prosecutor intended to provoke a mistrial when he made the improper argument and thus there was no bar to another trial. This interlocutory appeal challenges the propriety of the trial court's decision.

Defendant requests the decision of the lower court be reversed and an order dismissing the indictment be entered. Defendant makes one primary

argument and two arguments in the alternative: (1) the trial court improperly denied defendant's motion to dismiss the indictment because defendant's retrial is barred by the double jeopardy doctrine (U.S. Const., amend V; Ill. Const. 1970, art. I, § 10; 720 ILCS 5/3-4 (West 1992)); (2) the trial court improperly denied defendant's motion to dismiss the indictment because retrial is barred by defendant's due process rights (U.S. Cont. amends V and XIV; Ill. Const. 1970, art 1, §§ 2, 8, and 13; and (3) the trial court improperly denied the

defendant's motion for anticipated attorney fees and costs.

The proceedings below were had in the circuit court of Cook County. The notice of appeal was filed on October 29, 1992. We must first address defendant's primary argument that the trial court improperly denied defendant's motion to dismiss the indictment because his retrial is barred by the doctrine of double jeopardy. The double jeopardy clause of the fifth amendment to the United States Constitution, which is enforceable against the States through

the fourteenth amendment, states, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." (U.S. Const., amends. V, XIV.) Section 10 of article I of the Illinois Constitution provides the same protection. (Ill. Const. 1970, art. I, § 10.) We note at the outset that there are occasions where the defendant's valued right to have his trial concluded before the first jury impaneled is outweighed by the public's interest in fair trials designed to and in just judgments. (Arizona v. Washington (1978), 434 U.S.

497, 54 L. Ed. 2d 717, 98 S. Ct. 824.) The constitutional protection against double jeopardy prohibiting retrial is only unequivocal following an acquittal. (Arizona, 434 U.S. at 503.) A well established strand of double jeopardy law permits retrial following appellate reversal of a conviction. (Beringer v. Sheehan (7th Cir. 1991), 934 F. 2d 110, 114.) However, Oregon v. Kennedy (1982), 456 U.S. 667, 72 L. Ed. 2d 416, 102 S. Ct. 2083 established an exception to this rule. The Kennedy exception provides that where prosecutorial (or judicial) misconduct

was intended to goad defendant into moving for mistrial and where defendant successfully moves for mistrial, retrial is barred by the double jeopardy doctrine. In the case at bar, although the prosecutor's questions alluding to defendant's motive to kill the deceased were promptly objected to and sustained by the trial court, there was no mention for mistrial below. Both the defense counsel and the trial court failed to recognize any need for a mistrial. Moreover, the trial court, after an evidentiary hearing whose factual determinations are entitled to

considerable deference, found prosecutorial intent to provoke a mistrial. We cannot conclude that this finding was against the manifest weight of the evidence. Therefore, the Kennedy exception has not been triggered.

The Seventh Circuit Court of Appeals in Beringer went one step further than Kennedy and held that a defendant whose conviction is reversed by a reviewing court because of intentional prosecutorial misconduct but who did not move for a mistrial on that ground waives the right not to be

retried for the offenses. (Beringer 934 F.2d 110.) Defendant in the case at bar is in the same position as Beringer. We must conclude based upon Kennedy and Beringer that double jeopardy is not offended by permitting retrial following appellate reversal of defendant's conviction in the case at bar. Although defendant also invokes the double jeopardy guarantee in article 1, section 10, of the Illinois Constitution, a review of Illinois case law indicates that the Illinois Supreme Court has not construed the double jeopardy protections under the Illinois

Constitution to be any broader than those provided by the Federal Constitution. See e.g. People v. Stefan (1992), 146 Ill. 2d 324, 586 N.E.2d 1239.

In support of its first alternative argument, defendant has not cited any analogous cases in this state where a trial court's denial of defendant's motion to dismiss an indictment was reversed by a reviewing court because retrial violated due process rights. Nor is defendant's second alternative argument well grounded. In fact, defendant admits he

is aware of no rule, statute or precedent which provides for the relief he seeks (attorney fees and costs), nor are we.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

MURRAY, P.J. and GORDON, J., concur.

APPENDIX B

CIRCUIT COURT OF COOK COUNTY
CRIMINAL DEPARTMENT, THIRD DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
v.	)	No. 92-CR-6664
RALPH HARBOLD,	)	
Defendant.	)	

ORDER

This cause coming before this Court on the Motion of the Defendant, Ralph Harbold, and all parties having been notified, and the Court being fully advised in the premises,

IT IS ORDERED that the Defendant's Motion to Dismiss Indictment is denied.

ENTER:

10/1/92
Date

_____

APPENDIX C

CIRCUIT COURT OF COOK COUNTY
CRIMINAL DEPARTMENT, THIRD DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	
Plaintiff,	
v.	No. 92-CR-6664
RALPH HARBOLD,	
Defendant.	October 1, 1992

THE COURT: Any last words, Mr. Bailey? Your motion, you get the final word. Anything else you would like to say?

MR. BAILEY: No, Your Honor.

THE COURT: All right. Fine. Let

me take just a few minutes to review the notes that I made in the course of oral argument and I'll come back and I'll make my ruling.

(A short break was held.)

THE COURT: Back on the record in 92 CR 6664. I want to commend the attorneys, both sides, for their able briefs and terse argument on an interesting issue, more than interesting.

This could be an easier case for me to decide if we were arguing about a second rather than a third trial. Mr. Bailey has made that clear.

I'm troubled, as is the defense, that circumstances have conspired to make of this case a saga extending over now decades rather than a case that ideally, like most criminal cases, should be disposed of in months; but other than this emotionally equitable argument advanced by the defense, I simply can't find any way, under the law I'm bound to follow, to do anything other than to let the third trial proceed.

The easy resolution for me would have been to simply find that the case is on remand, that I'm bound by the

directive of the Appellate Court and to add parenthetically that the defendant waived the arguments that he has made before me this morning by failing to move for a mistrial during final argument or raising these specific issues before the Appellate Court.

But I think it's better to go directly to the central issue raised by the pleadings and make a specific finding that based on the circumstances of the trial as I have been able to glean them from the pleadings that have been presented to me and the response of the prosecutor to the questions in

this hearing, that the defense has failed to establish that the improper final argument of the prosecutor was deliberately intended to provoke a mistrial. I so find.

He was directed to avoid motive evidence in his case in chief. He did so.

His remarks and final rebuttal argument were made in response to an argument of the defense; and though in hindsight we can all muse whether it would have been better for the prosecutor to seek leave of Court in a sidebar before proceeding to go beyond

the motion in limine than to make his argument, that hindsight does not take into account the heat of battle in the trial court trenches, and all of the lawyers who have argued before me today are aware of those.

APPENDIX D

APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIFTH DIVISION
September 30, 1991

No. 1-89-2849

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)Appeal from the)Circuit Court)of Cook County.
v.	)Honorable)Pamela G.)Karahalios,
RALPH HARBOLD, Defendant-Appellant.	)Judge)Presiding.

PRESIDING JUSTICE LORENZ delivered the opinion of the court:

After his first conviction for murder was reversed on appeal and remanded for new trial (People v.

Harbold (1984), 124 Ill. App. 3d 363, 464 N.E.2d 734), a jury again found defendant, Ralph Harbold, guilty of murder (Ill, Rev. Stat. 1987, ch. 38, par. 9-1(a)(1)). He was sentenced to an extended term of 70 years' imprisonment and he now appeals. We consider the following issues: (1) whether the prosecutor made improper comments during closing argument which were not based on the evidence and prejudiced defendant; (2) whether the denial of defendant's motion in limine to exclude evidence was manifestly erroneous; and (3) whether defendant

was denied a fair trial when he was limited to seven peremptory challenges under Supreme Court Rule 434(d) (134 Ill. 2d R. 434(d)). For the following reasons, we reverse and remand for new trial.

Prior to the second trial, defendant moved in limine to exclude a circular saw and expert testimony relating to blood splatters on the saw arguing its probative value was outweighed by its prejudicial nature. The motion was denied.

Also prior to trial, when considering motions relating to the

opinion reversing defendant's conviction, a judge warned the assistant State's Attorney regarding the presentation of motive evidence: "If you go into motive testimony at any time in your case in chief other than what I've ruled on, I'm going to hold you in contempt, I'm warning you now so we don't have any misunderstanding."

The following testimony from trial is relevant to our decision.

On March 31, 1981, at approximately 7:00 p.m., Frank Paul was stabbed several times in his business office. Covered in blood, he staggered

to a restaurant across the street and told the owner, "I've been attacked." Paul lost consciousness and died within a short time.

Investigating the murder, the police found that the back door to Paul's office was open. Inside, a trail of blood led to a room where there was evidence of a struggle, however, there was no sign of a forced entry and nothing was missing.

In a search of the surrounding area outside Paul's office, the police found items which appeared to have blood on them. These items included a

pair of rubber gloves, a knife, and a camel-colored sport coat with keys to Paul's office in the pocket. The left-hand rubber glove had a cut in the area between the thumb and forefinger.

Dr. T.L. An, a pathologist, performed an autopsy on Paul. He testified that Paul received seven stab wounds and ten cutting wounds, several of which indicated that Paul was attempting to defend himself. In An's opinion, the wounds could have been caused by a knife with a blade at least four inches long.

Michael Podlecki, a forensic

scientist, testified that ABO blood-type analysis showed Paul's blood was type A and defendant's blood was type O. All the blood samples found at or near the scene were either type A or type O. Both type A and O were found inside Paul's office and on the camel-colored sport coat. Type A was found on the knife and type O was found on the rubber gloves. In addition to blood-type analysis, Podlecki testified that the impression in the blood on the knife was consistent with the pattern on the rubber gloves. In his amended report, he indicated that the cut in

the web of the left-hand rubber glove was 11 centimeters long. Podlecki also testified that blond hairs found at the scene and on the knife were not consistent with defendant's hair which was black.

Susan Perna, Paul's daughter, testified that defendant and his family were good friends of her family's.

Nancy Paul Horton, Paul's wife who subsequently remarried, testified that she and defendant shared an interest in airplanes and collector's cars. Horton owned a business that operated two airports in Wisconsin and sold

airplanes. Defendant purchased two airplanes from Horton's business and leased them back to the business. The week before Paul was murdered, she gave defendant a set of keys to start one of her cars in storage and defendant returned the keys within two days. The set included keys to Paul's office. Horton also testified that the camel-colored sport coat found outside Paul's office was the same type as a sport coat that defendant often wore.

Other members of Paul's family testified that after the murder, between April 1 and April 5, they

attempted to contact defendant by telephone but could not reach him. Defendant did not attend Paul's funeral.

Several police officers also attempted to contact defendant at his home and at his office after the murder but were unsuccessful.

Marlene Harbold, defendant's sister, testified that beginning on April 5, she took care of defendant's children in his house because he was sick. She testified that defendant had a bandage on his left hand. Defendant told her he nicked his thumb with a saw

and accidentally cut the web of his hand, between the thumb and forefinger, with a butcher knife.

Ann Gover, defendant's employee, testified that defendant did not work from April 1 until April 7 because he had been sick. When he returned, she noticed a cut on his left hand in the web between the thumb and forefinger. Defendant told her he cut his hand while installing panelling.

On defendant's first day back at work, Officer Curtis Frost interviewed him in his office. When Frost first saw defendant, he noticed a cut on his

hand, a couple of inches long, between the thumb and forefinger covered by bandages. Defendant kept his left hand in his pocket for the rest of the interview. Defendant told Frost that he was at home, sick with the flu, for the past few days and did not answer the telephone. Defendant also said that although he had heard of Paul's death, he did not contact the family.

A search warrant was issued for defendant's house which was executed on April 10. Officer Terrence Conley testified that during the search he spoke with Marlene Harbold who told him

she had noticed defendant's left hand was bandaged. She also told Conley that defendant told her he injured the web between the thumb and forefinger while he was cutting a door with a circular saw. The police recovered the saw and the door which appeared to have bloodstains on them, however, they did not find defendant's camel-colored sport coat.

Mohammed Tahir, a forensic scientist, examined the bloodstain on the circular saw and found there was no blood in the teeth of the saw. In his opinion, the blood came in contact with

the saw when it was not moving and the stain was consistent with touching the saw with a bloody finger on hand. The blood on the saw was type O, the same as the defendant's blood type.

Dr. Joseph Danna examined defendant on April 10 pursuant to a court order. Defendant had two cuts on his left hand: one was on the web between the thumb and forefinger and the other was on his thumb. The cuts were one to two weeks old and occurred from the same event. The web cut, which showed signs of infection, was two inches long and should have been

sutured. In Danna's opinion, the cuts appeared to have been caused by a knife and could not have been caused by a circular saw.

Tim Klier, a bank employee, testified that he saw defendant in the bank on March 31, the day Paul was murdered, and he did not have cuts on his left hand. Photographs taken by the security camera in the bank supported this testimony.

The State rested its case against defendant. Defendant presented the following witnesses.

Robert Farrell, a retired police

officer, assisted in the investigation of Paul's murder. He interviewed a friend of Paul's who stated that the police or the Federal Bureau of Investigation spoke with Paul about another man, also with the last name Paul, who was suspected of transporting stolen cars.

Walter Sherk, a forensic scientist, testified that the lock on Paul's office had been tampered with at some time but he could not determine if the tampering was successful.

Janet Cook, a former employee of Paul's business, testified that at 5:00

p.m., on the night Paul was murdered, she saw a man with curly hair sitting in a parked car behind the office.

Maria Raspanti, also a former employee, testified that she did not remember ever seeing a man by the name of Martin Paul or describing him to police. She also testified that two months before the murder, police officers came to the office and spoke with Paul but she did not know what the conversation was about. She did not remember receiving a telephone call two days later from Martin Paul for Frank Paul.

The parties stipulated that Officer Frost would testify that Raspani described Martin Paul to the police and told them that the police spoke with Frank Paul two months before his death about transporting stolen cars.

In closing argument, defense counsel argued that defendant had a friendly relationship with Paul and there was no evidence of a disagreement between them. Although he stated that motive was not required, he argued there was no evidence introduced to show why defendant would murder Paul.

In rebuttal, the assistant State's Attorney argued:

> "And the defense has asked you about motive. Now, I told you right off from the start, we do not have to prove why he did it. Who knows what evil lurks in the hearts of men? I told you right from the start, all we have to do is prove that he did it. And I will show you beyond any reasonable doubt that he did it.
>
> The defense counsel has

asked [you to] think about why he might have done it. Well, maybe he admired Mrs. Paul from afar."

Defendant objected and the objection was sustained but the assistant State's Attorney continued:

"The evidence shows that while Mr. Paul did not share Mrs. Paul's interest in aviation, this man did. This man had involvements with Mrs. Paul financially as well as through business: He purchased airplanes from Mrs.

Paul, leased them back to Mrs. Paul. They shared the hobby of collecting classic T-bird cars. They both had their cars done by Mr. Wisniewski.

After the trial, go back to your parlors and your dens and you can talk about it at the local tavern and you can satisfy yourself and maybe think why you think he did it; but the Judge is not going to instruct you that we have to prove one iota of evidence as to why. So let's keep on the

track and not be distracted by the red herring."

The jury found defendant guilty of murder. The trial judge sentenced him to an extended term of 70 years' imprisonment based on a finding that the crime was exceptionally brutal and heinous. Defendant now appeals.

OPINION

Defendant has raised several claims of error. We consider first the issue of prosecutorial misconduct which requires reversal of defendant's conviction.

Defendant argues that his

conviction should be reversed because he was prejudiced by the prosecutor's improper comments in closing argument. Primarily, defendant complains that the State, although prohibited from introducing motive evidence during the trial, speculated on defendant's motive before the jury. In closing, the prosecutor stated, "maybe he admired Mrs. Paul [Horton] from afar." When defendant's objection was sustained, the prosecutor continued to comment on interests that defendant and Horton shared to the exclusion of Frank Paul. The State contends that the comments

were a proper response to defendant's closing argument that the State did not prove motive. Also, the State contends that any prejudice was cured when the trial judge sustained defendant's opinion to the comments.

Generally, the prosecutor has wide latitude in closing argument and may properly comment on the evidence presented at trial and legitimate inferences drawn from the evidence. (People v. Smith (1990), 141 Ill. 2d 40, 565 N.E.2d 900.) However, the prosecutor may not argue assumptions or facts not based on the evidence or

present to the jury what amounts to his own testimony. Smith, 141 Ill. 2d 40, 565 N.E.2d 900.

In Smith, the supreme court held that it was improper for the prosecutor to argue to the jury that defendant committed murder for gang-related retaliation when there was no evidence to support that argument. The court stated, "[a]bsent evidence tending to tie the State's 'motive evidence' to defendant, we perceive that the prosecutor's arguments could serve no purpose other than to 'inflame the passion or arouse the prejudice of the

jury against the defendant without throwing any light on the question for decision,'" (Smith, 141 Ill. 2d at 62, 565 N.W.2d at 909 (quoting People v. Dukes (1957), 12 Ill. 2d 334, 342-43, 146 N.E.2d 14, 18).) Defendant's conviction was reversed and remanded for new trial due to the cumulation of several errors including improper comment.

In People v. Mullen, (1990), 141 Ill. 2d 394, 566 N.E.2d 222, which is analogous to the present case, the prosecutor commented in closing argument on evidence which was

specifically excluded from trial. The supreme court found the improper comments were highly prejudicial. Although a prosecutor's comments on excluded evidence may not alone deny a defendant a fair trial, the court found that because the evidence at trial was closely balanced, the comments probably influenced the jury to return a guilty verdict. As a result, the court reversed and remanded for new trial based on the improper comments.

To resolve the issue presented, we must discuss the history of this case. Defendant's first conviction for Paul's

murder was reversed and remanded for new trial based, in part, on the erroneous admission of motive evidence. (Harbold, 124 Ill. App. 3d 363, 464 N.E.2d 734.) Evidence was presented in the first trial purporting to establish a relationship between defendant and Horton from which the jury could infer defendant's motive for killing Paul. Without this evidence, the other evidence at trial did not indicate a reason for defendant to kill Paul. This court held that the evidence was inadmissible because it was too remote in time from Paul's murder and, as a

result, defendant was substantially prejudiced, especially because the case was based entirely on circumstantial evidence. When defendant was retried, the State was precluded from presenting motive evidence and the prosecutor was warned not to inject motive evidence in the State's case in chief.

The prosecutor's comment that "maybe he admired Mrs. Paul [Horton] from afar" was not based on evidence presented at trial. It was pure speculation, as defendant noted in his argument focusing on the shared interests of defendant and Horton. The

implication of the comments was obvious. Without the suggestion, the evidence would not have led the jury to that conclusion. Further, the comments were a back door attempt to present the jury with motive when evidence of motive was specifically excluded from trial. We can only conclude that the prosecutor deliberately circumvented the court's ruling excluding motive evidence.

The State contends that the comments were made in response to defendant's comments that the State did not present a motive for defense to

have killed Paul. (See People v. Dixon (1982), 91 Ill. 2d 346, 438 N.E.2d 180 (defendant could not claim prosecutor's comments were improper when they were made in response to defendant's argument).) However, the proper response would have been to reiterate to the jury that the State was not required to prove motive as an element of murder. Instead, the prosector went a step further and offered a motive for the jury. The State also contends that any prejudice was cured when the judge sustained defendant's objection. (See People v. Scott (1990), 194 Ill. App.

3d 634, 551 N.E.2d 288 (sustaining objection and immediately instructing the jury to disregard improper comment cured prejudice).) In this case, the judge sustained the objection but did not immediately instruct the jury to disregard it.

Improper comment in closing argument will not justify reversal unless it resulted in substantial prejudice to defendant, considering the context of the language used, its relationship to the evidence, and its effect on defendant's rights to a fair and impartial trial. Smith, 141 Ill.

2d 40, 565 N.E.2d 900.

In this case, the improper comment, implying an illicit relationship between defendant and Horton, was not based on the evidence and inflamed the passion and aroused the prejudice of the jury against defendant. "[A]n insinuation which leaves the jury to speculate may be more prejudicial than erroneously admitted specific proof." (People v. Emerson (1983), 97 Ill 2d 487, 497, 455 N.E.2d 41, 45.) Also, defendant's conviction rested solely on circumstantial evidence which was

closely balanced and the impact of the comment on the jury was significant. The important task of deciding whether someone is guilty should not be influenced by an invitation to speculate as the prosecutor offered in this case when he used the word "maybe" and suggested a motive. As a result, defendant was substantially prejudiced and his conviction must be reversed and remanded for new trial.

Although not dispositive of this appeal, we also consider two other arguments defendant raised concerning issues that may affect his retrial.

Defendant argues that the denial of his motion in limine was manifestly erroneous. He moved to exclude the circular saw found in his house and the corresponding expert testimony that the blood on the saw was placed there when the saw was not moving.

On appeal, he contends that the circular saw was not relevant at trial because there was no evidence linking it to the crime. He relies on Marlene Harbold's testimony that defendant told her he cut his left hand on a saw but she did not testify that it was a circular saw. Defendant ignores

Officer Conley's testimony that Marlene Harbold told him that defendant told her he cut his hand on a circular saw. Based on this, there was sufficient evidence to link the circular saw to defendant's effort to conceal the crime and the evidence was relevant. The denial of defendant's motion in limine was not manifestly erroneous.

Defendant also argues that he was denied a fair trial when he was limited to seven peremptory challenges under Supreme Court Rule 434(d) (134 Ill. 2d R. 434(d)) rather than ten peremptory challenges under section 115-4(e) of

the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1987, ch. 38, par. 115-4(e)). When defendant was first tried, he was allowed ten peremptory challenges under section 115-4(e), however, at the time of his second trial, amendments to Rule 434 were in effect which reduced the number of peremptory challenges to seven.

Because section 115-4(e) directly conflicts with Rule 434(d) and the issue is a matter of court procedure, Rule 434(d) controls. (People v. Colclasure (1990), 200 Ill. App. 3d 1038, 558 N.E.2d 705.) As a result,

defendant was properly granted seven peremptory challenges under the law in effect at the time of his second trial.

Reversed and remanded for new trial.

MURRAY and GORDON, JJ., concur.

EXHIBIT E

ILLINOIS SUPREME COURT

October 6, 1994

Mr. F. Lee Bailey
Law Offices of Bailey & Fishman
66 Long Wharf
Boston, Massachusetts 02110

No. 77457 - People State of Illinois, respondent, v. Ralph Harbold, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1994.